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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-532

CONSOLIDATION COAL COMPANY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

ANTHONY J. POLITO
ROGER CURRAN
900 Oliver Building
Pittsburgh, Pa. 15222
Counsel for Petitioner

Of Counsel:
WILLIAM J. MELVIN
50 West Broad Street
Columbus, Ohio 43215

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. .....

CONSOLIDATION COAL COMPANY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner, Consolidation Coal Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 25, 1978, reinstating its prior judgment, which reversed orders of the United States District Court for the Southern District of Ohio suppressing evidence in this criminal prosecution and remanded the case.

OPINIONS AND ORDERS

The original opinion and judgment of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") appears at 560 F.2d 214 (6th Cir. 1977). The Order of this Court granting Certiorari, vacating the judgment of the Sixth Circuit and remanding the case for further consideration appears at 436 U.S. ....., 98 S. Ct. 2841 (1978). The Order of the Sixth Circuit on remand, not yet reported, is reprinted in the Appendix attached to this petition (A. 1a-3a).[1] The unreported memoranda and orders of the District Court are reprinted in the Appendix to the Petition for Certiorari heretofore filed in this Court by petitioner at No. 77-557. (A. [77-557] 21a-41a, 42a-44a).

JURISDICTION

The Order of the Sixth Circuit reinstating its prior judgment was entered on July 25, 1978. A timely petition for a rehearing *en banc* was denied on August 29, 1978 (A. 4a), and this petition for certiorari was filed within 30 days of that date. On September 14, 1978, the Sixth Circuit granted petitioner's motion to stay issuance of its mandate pending the filing of this petition (A. 5a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioner is informed that at least Francis Leo Marks, appellant at No. 76-2521 in the Sixth Circuit, is also filing a petition for a writ of certiorari.

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1. References to the Appendix to this petition will be cited as (A. .....). References to the Appendix to the petition filed at No. 77-557 in this Court will be cited as (A. [77-577] .....).

QUESTIONS PRESENTED

1. Whether the less stringent administrative search probable cause standard recently articulated by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. ....., 98 S. Ct. 1816 (1978) and *Michigan v. Tyler*, 436 U.S. ....., 98 S. Ct. 1942 (1978) is applicable in this case where it is undisputed that the purpose of the searches and seizures in question was the discovery of evidence of suspected criminal violations.

2. Whether administrative search warrants may be employed to force entry into a coal mine operator's private mine offices and seize documents and other property found there despite the specific provisions in the Federal Coal Mine Health and Safety Act of 1969 envisioning resort to federal court enforcement proceedings when entry or the production of documents and records is refused.

3. Whether the affidavits used to obtain the search warrants at issue supply the requisite probable cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. AMEND. IV—SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The provisions of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "Mine Safety Act") relevant to the issues raised in this case are lengthy and have therefore been set forth in the Appendix attached to this petition (A. 6a-15a). The sections involved are:

> *Section* 103 (30 U.S.C. § 813), entitled "Inspections and Investigations";
>
> *Section* 108 (30 U.S.C. § 818), entitled "Injunctions"; and
>
> *Section* 109 (30 U.S.C. § 819), entitled "Penalties".

STATEMENT OF THE CASE

This case was previously before this Court on a petition for a writ of certiorari at No. 77-557. The petition was granted on June 5, 1978, the prior judgment of the Sixth Circuit vacated and the case remanded "for further consideration in light of *Marshall v. Barlow's, Inc.*, 436 U.S. ..... (1978), and *Michigan v. Tyler*, 436 U.S. ..... (1978)." 436 U.S. ....., 98 S. Ct. 2841 (1978).

On July 25, 1978, the Sixth Circuit, on remand, entered an Order reinstating its prior judgment for the reasons set forth in its original opinion (560 F.2d 214) and remanding the case to the District Court.

This matter began on May 21, 1974, when, at the request of attorneys from the Government Regulations and Labor Section, Criminal Division, United States Department of Justice, a federal magistrate issued search warrants to enter various offices in petitioner's Central Division in Eastern Ohio to search for evidence of suspected criminal violations.

All of the warrants[2] but one were based upon the affidavit of William E. Holgate (A. [77-557] 53a-56a), an employee of the Mining Enforcement and Safety Administration of the Department of the Interior. The remaining warrant was supported by both Holgate's affidavit and that of Thomas A. Jeskey (A. [77-557] 58a-60a), a federal coal mine inspector. These affidavits referred to information obtained from an unnamed former employee of petitioner concerning alleged irregularities in petitioner's respirable dust sampling program and recited that evidence of violations of criminal provisions of the Mine Safety Act was believed to be concealed in the mine offices to be searched. (*See, e.g.*, A. [77-557] 52a-55a).

Searches were conducted pursuant to the warrants in a surprise raid on May 22, 1974 by federal inspectors who had been appointed special deputy United States Marshals. There was no prior demand upon petitioner for the desired materials, nor were any federal court enforcement proceedings initiated to obtain them.

On the authority of the warrants, the deputies entered petitioner's private offices and confiscated a great mass of books, note pads, folders and cassettes, as well as metal file card containers, entire file cabinets or drawers, and a set of scales, (*See, e.g.*, A. [77-557] 51a, 87a, 93a).

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2. The six search warrants involved in this case, with attached returns and affidavits, have been reprinted (A. [77-557] 45a-95a). To avoid duplication, the typewritten portions of the Holgate affidavit filed in support of each warrant were reproduced only with respect to the first warrant.

In August of 1975, indictments were returned against petitioner (and eight of its current or former employees) charging numerous separate violations of two criminal provisions of the Mine Safety Act[3] and two counts of criminal conspiracy.[4] The indictments were based, entirely or primarily, upon the materials seized in the May, 1974 raid and the fruits of the seized materials.

Petitioner filed a timely motion for return of seized property and suppression of evidence in the District Court. On June 11, 1976, the District Court granted petitioner's motion on the ground that the affidavits used to obtain the warrants failed to show probable cause under the two-prong test established by this Court in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). (A. [77-557] 21a-41a). Respondent's subsequent motion for reconsideration was denied by the District Court on September 2, 1976. (A. [77-557] 42a-44a).

Respondent appealed to the Sixth Circuit under the provisions of 18 U.S.C. § 3731, certifying that the suppressed evidence was "a substantial proof of the charge[s] pending against the defendant[s]." On July 21, 1977, that Court reversed and remanded, a plurality of the panel holding, *sua sponte,*[5] that the administrative standard of probable cause announced in *Camara*

3. Section 109(b) and (d), 30 U.S.C. § 819(b) and (d). (A. 14a-15a).

4. 18 U.S.C. § 371.

5. The applicability in this case of an administrative standard of probable cause was neither briefed nor argued by any party in the District Court or the Sixth Circuit.

v. Municipal Court, 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967) was controlling in this case, despite the admitted criminal nature of the searches, and that the affidavits satisfied this less stringent test. Circuit Judge Engel, concurring in the result, concluded that the affidavits had met the more onerous standards of *Aguilar* and *Spinelli* but found "certain issues relating to administrative searches and seizures covered [in the plurality opinion] . . . sufficiently troublesome . . . that . . . their resolution [should be saved] until the case arises which demands it." 560 F.2d at 222.

Following this Court's vacation of the judgment and remand of the case for reconsideration in light of *Marshall* and *Tyler,* a plurality of the original panel of the Sixth Circuit, without requesting briefs or hearing oral argument, issued a summary opinion and Order reinstating its previously vacated judgment on the basis that there was "no reason to alter . . . [the] original holding." (A. 2a). Again, Circuit Judge Engel concurred in the result "for the more limited reasons expressed in his original concurrence." (A. 3a).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Sixth Circuit Is in Direct Conflict With the Decision of This Court in Michigan v Tyler.

The Sixth Circuit either failed to reconsider this case in light of *Michigan v. Tyler,* as directed by this Court, or it completely misconstrued that decision.

In *Tyler,* this Court clearly and expressly acknowledged the significant difference between administrative inspections and criminal searches and held that where " 'the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.' " 436 U.S. at ....., 98 S. Ct. at 1950. This Court's holding in *Tyler* was stated with unmistakable clarity:

> In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. [Citations omitted.] Evidence of arson discovered in the course of such investigations is admissible at trial, *but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. Id.* at ....., 98 S. Ct. at 1951 (emphasis added).

As the following short discussion will show, the Sixth Circuit, on remand, completely ignored the law as given in *Tyler.*

In its original [1977] decision, the Sixth Circuit repeatedly acknowledged the obvious fact that the searches and seizures involved here were "predicated upon overt criminal suspicion rather than administrative necessity." *United States v. Consolidation Coal Company,* 560 F.2d 214, 218 (6th Cir. 1977). The "criminal orientation [of the investigation] was", according to the Court, "*dramatized* by the fact that the mine safety inspectors who executed the warrants were deputized as Special Deputy United States Marshals."[6] *Id.* at 216 n. 6 (emphasis added).

Despite its knowledge that the searches and seizures involved here were to obtain evidence for a criminal prosecution, the Sixth Circuit found that the searches were " 'routine' in scope if not in motivation" and that "[t]heir regulatory character was not diminished" by the manifest criminal suspicion which prompted them. *Id.* at 218. In the context of the Mine Safety Act it held, relying upon *Camara* and *See,* that "[t]he basic rationale for demanding a more compelling showing of probable cause where the purpose of the intrusion is to uncover the fruits or instrumentalities of crime is inapposite. . . ." *Id* at 220. The Court then concluded:

> The magistrate's task will be expedited and the opportunity for reversible error substantially re-

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6. Moreover, the warrants and affidavits themselves state that the searches and seizures were to obtain evidence of suspected criminal violations of the Mine Safety Act. (*See, e.g.,* A. [77-557] 45a-46a, 52a-53a, 55a).

> duced if all Section 813 search warrant applications are subject to a uniform, administrative standard of review, *whether or not criminal violations of the Act are suspected. Id.* at 221 (emphasis added).

In its summary opinion on remand from this Court the Sixth Circuit concluded that its earlier holding "that administrative search warrants were required under the facts of this case" was consistent with this Court's decision in *Marshall* requiring administrative warrants under the Occupational Safety and Health Act (A. 2a). However, the Court overlooked the fact that *Marshall* involved only a routine administrative inspection where there was no indication, as here, that the purpose of the inspector's visit was to uncover evidence of a suspected crime. Above all, it inexplicably ignored the crucial distinction drawn in *Tyler* between the applicable probable cause standard where the authorities are searching for evidence of crime and that appropriate for administrative entries.

The Sixth Circuit's continued reliance upon *Camara* and *See* as authority for the application of an administrative probable cause showing, *even where criminal violations are suspected and the obvious purpose of the search is to obtain evidence for a criminal prosecution,* is clearly erroneous and in direct conflict with this Court's decision in *Tyler*. As Mr. Justice White recently explained in *Zurcher v. Stanford Daily,* 436 U.S. ....., 98 S. Ct. 1970 (1978), "both cases held that a less stringent standard of probable cause is acceptable where the entry is *not* to secure evidence of crime against the

possessor."[7] *Id.* at ....., 98 S. Ct. at 1976 (emphasis added).

Although the Solicitor General made no *express* confession of error as to this point when the case was previously before this Court on certiorari petition, the error was tacitly conceded by the absence of any attempt to justify the Sixth Circuit's action. In fact, the Government candidly acknowledged the criminal nature of the searches involved, as well as the distinction between administrative inspections and criminal searches (which has now twice been missed or ignored by the Sixth Circuit) when it stated

> the inspection [here] was aimed at uncovering evidence of criminal conduct in the Company's administration of the required federal regulatory scheme to monitor the causes of "black lung" disease and at seizing documents and other materials demonstrating corporate non-compliance with the Act, rather than merely searching for physical safety or health hazards.
>
> (Brief for the United States in Opposition at 10 n. 8, at No. 77-557).

In *Tyler* this Court, unlike the Sixth Circuit, recognized that "[t]he showing of probable cause necessary to secure a warrant may vary with the object and in-

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7. Mr. Justice White reiterated this point in his concurring and dissenting opinion in *Tyler*:

> *Camara v. Municipal Court,* . . . and *See. v. City of Seattle,* . . . did not differ with *Frank v. Maryland,* . . . that searches for criminal evidence are of special significance under the Fourth Amendment. 436 U.S. at ....., 98 S. Ct. at 1954.

trusiveness of the search, . . ." 436 U.S. at ....., 98 S. Ct. at 1948.[8] If certiorari is granted, petitioner will argue that where the object of the search is to secure criminal evidence, the intrusion is equally oppressive whether the suspected crime is common law in origin or created by statute. It follows that a warrant justifying a search of this nature may be obtained only upon the traditional showing of probable cause applicable to criminal cases. Such is petitioner's understanding of this Court's holding in *Tyler* and demonstrates the fundamental conflict resulting from the Sixth Circuit's contrary decision.

2. The Sixth Circuit Has Improperly Construed the Mine Safety Act as Sanctioning the Use of Administrative Warrants to Conduct Searches and Seizures in Petitioner's Private Offices and, in so Doing, Is in Conflict With the Ninth Circuit.

This case also presents a conflict between the Sixth and the Ninth Circuits as to whether this Court in *Camara* and *See* was fashioning a rule permitting the generalized use of *ex parte* administrative warrants for searches and seizures by administrative agencies.

In its original [1977] decision in this case the Sixth Circuit held that the Mine Safety Act does not provide for a right of warrantless entry[9] into the mine

8. *See also* LaFave, *Administrative Searches and the Fourth Amendment; The Camara and See Cases,* 1967 SUP. CT. REV. 1, 18-20.

9. If certiorari is granted, petitioner will argue that under the Mine Safety Act there is no right of entry into the operator's private mine offices where he

operator's private offices "and nothing in the Act authorizes the wholesale seizure of records which took place here." 560 F.2d at 217. It reasoned that inspectors must have warrants to justify a search and seizure therein. However, it further concluded, under the authority of *Camara* and *See,* that the Mine Safety Act permitted such warrants to be secured on the less stringent administrative showing of probable cause.

In that holding, recently reaffirmed, the Sixth Circuit wholly ignored the provisions in the Mine Safety Act for the obtainment of subpoenas[10] and/or injunctions[11] and the issuance of civil fines[12] to compel entry and obtain desired materials and the lack of any statutory authority for the issuance of administrative warrants. Though never expressed, the Court's disregard of the statutory enforcement procedures was apparently based on a belief that the Congressionally mandated methods lack the necessary surprise effect; however, no empirical evidence of any sort was cited to support this conclusion. 560 F.2d at 219.

For the reasons set forth in Part 1 of this petition, it is submitted that the Sixth Circuit acted contrary to this Court's decision in *Tyler* in holding that an administrative warrant could be used in this case to search for and seize evidence of a suspected criminal violation.

retains "a general expectation of privacy. . . ." *Youghiogheny and Ohio Coal Company v. Morton,* 364 F. Supp. 45, 51 n. 5 (S.D. Ohio 1973). The Act gives a right of entry only into "coal mines". 30 U.S.C. § 813(b). (A. 6a).

10. 30 U.S.C. § 813(d) (A 7a-8a).

11. 30 U.S.C. § 818 (A. 10a-11a).

12. 30 U.S.C. § 819(a)(1) (A. 12a).

Petitioner also submits that the Sixth Circuit's interpretation of the *Camara* and *See* decisions as authorizing the use of administrative warrants for any form of entry and seizure under the Mine Safety Act is not only erroneous but in conflict with the Ninth Circuit's holding in *Midwest Growers Co-op. Corp. v. Kirkemo,* 533 F.2d 455 (9th Cir. 1976), which involved administrative inspections under the Interstate Commerce Act.

There, relevant portions of the Act authorized the Commission or its agents to "have *access* to and . . . to *inspect, examine,* and *copy* any and all accounts, books, records, [and] memorandums, . . ."[13] of the involved corporation during normal business hours. Despite this broad statutory grant of administrative authority, the Ninth Circuit refused to imply from the statute the authority to use administrative warrants to enforce inspection because the Act, while establishing procedures to compel access and copying, did not expressly provide for a right of entry upon the premises.

Although cognizant of this Court's prior decisions in *Camara, See* and *Colonnade Catering Corp. v. United States,*[14] the Ninth Circuit found nothing in those cases "to indicate that the [Supreme] Court was fashioning a general rule to allow all administrative agencies to utilize search warrants for their investigations." 533 F.2d at 462. The Court observed the absence of "express authority in the Interstate Commerce Act . . . for the Commission to use an 'administrative inspection search warrant' to enforce its statutory right of inspection", and

13. 49 U.S.C. § 320(g) (emphasis added).
14. 397 U.S. 72 (1970).

found nothing in its own decisions or in *Camara* and *See* to support the proposition that "the use of an inspection warrant could be . . . implied", adding that such a warrant represented a "radical departure from the injunctive procedure established by Congress . . ." *Id.* at 462. "In the absence of statutory authority to enter," said the Court, "the agency must utilize other investigatory techniques" provided by the statute. *Id.* at 462-63 (footnotes omitted).

By contrast, the Sixth Circuit has in this case *implied* from the Mine Safety Act, through application of the *Camara* and *See* decisions, the mine inspector's right to obtain an administrative warrant (1) to gain entry into petitioner's private offices, (2) to examine and review documents in those offices and (3) most significantly, to seize and carry away materials found there. Clearly, none of these investigatory powers is expressly granted in Section 813(a) and (b), or elsewhere in the Mine Safety Act. Unlike the Ninth Circuit, the Sixth Circuit interpreted statutory omissions "as evidence of congressional intent to endow mine safety inspectors with the broadest possible discretion,"[15] including the right to obtain administrative warrants and the forcible seizure of personal property.

Among the novel questions illustrated by this conflict, to which this Court has not yet addressed itself, and as to which guidelines are needed, the following are believed to be important:

1. May the right to use an *ex parte* administrative warrant to compel entry and seize documents be *implied,*

15. 560 F.2d at 218.

under the authority of *Camara* and *See,* from a statute which does not expressly grant the administrative agency the right to obtain such warrants or to enter the office premises or to examine and seize materials found there, but does expressly provide other procedures to compel entry and force production of desired records?

2. To what extent is the solution to question No. 1 dependent upon or affected by: (a) the type and relative effectiveness of the other investigatory procedures provided for by Congress in the statute, and (b) the fact that Congress has, in several regulatory statutes enacted since *Camara* and *See,* not including the Mine Safety Act, expressly authorized the obtainment of administrative search warrants?

In the Mine Safety Act, enacted two and one-half years after *Camara* and *See,* Congress clearly and carefully stipulated that entry as well as documents and records could be obtained from uncooperative mine operators by subpoena[16] and/or injunctive relief[17] and

16. 30 U.S.C. § 813(d), which authorizes the Secretary of the Interior to issue subpoenas for "the production of relevant papers, books and documents, . . ." in connection with the "investigation of any accident or *other occurrence* relating to health or safety in a coal mine, ..." (A. 7a). (Emphasis added.)

17. 30 U.S.C. § 818, which authorizes the Secretary of the Interior to obtain an injunction to compel an operator, to, *inter alia,* "admit [the inspector] to the mine" or "permit the inspection of the mine" or "furnish any information or report requested . . ." or "permit access to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of . . . [the Act]." (A. 10a).

also subjected such operators to penalties.[18] However, unlike the Comprehensive Drug Abuse Prevention and Control Act[19] and other post *Camara-See* legislation,[20] it did not provide for the issuance of administrative search warrants as a means of enforcing the agency's investigatory powers. It is difficult to imply the right to such warrants, since they represent, to use the Ninth Circuit's phrase, a "radical departure" from the subpoena and injunctive procedures established by Congress in the Mine Safety Act by permitting the warrant to issue *ex parte,* without prior notice to the operator whose offices are to be searched and property seized.

If certiorari is granted, petitioner will argue that Congress, by its failure in the Mine Safety Act to authorize expressly either a right of entry and seizure in private mine offices or the use of administrative warrants, while specifically providing for subpoenas, injunctions and fines, envisioned a prior demand for and refusal of entry or documents followed by federal court enforcement proceedings rather than employment of an *ex parte* warrant procedure.

18. 30 U.S.C. § 819(a)(1). (A. 12a).

19. 21 U.S.C. § 880. This legislation was enacted less than a year after the Mine Safety Act. It is interesting to observe that the legislative history of the Drug Abuse Prevention and Control Act shows that administrative search warrants were expressly provided for in response to this Court's decisions in *Camara* and *See.* H. R. REP. No. 91-1444, 91st Cong., [1970], U.S. CODE CONG. & AD. NEWS 4623.

20. *See, e.g.,* the Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 135 et seq., 136g(b); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq., 1540 (e)(2) and (3); and the Federal Noxious Weed Act of 1974, 7 U.S.C. §§ 2801 et seq., 2806.

Significantly, in *Marshall,* this Court strongly suggested agreement with the foregoing proposition by noting that, in comparison with the Occupational Safety and Health Act and other regulatory statutes, the Mine Safety Act "envision[ed] resort to federal court enforcement when entry is refused, employing specific language. . . ." 436 U.S. at ....., 98 S.Ct. at 1825. Also noteworthy is the fact that the cases in which this Court has sanctioned the use of administrative warrants (*Camara, See, Marshall* and *Tyler*) have all involved statutes which provided for entry and inspection but no specifically legislated means by which entry could be gained over the property owner's refusal. As the Ninth Circuit found in *Kirkemo,* and as this Court seemed to indicate in *Marshall,*[21] there is nothing in this Court's prior decisions revealing an intention to establish a general rule allowing all administrative agencies to employ administrative warrants in their investigations.

There is confusion as to the extent to which the right to administrative warrants may be implied from administrative statutes which expressly provide other means for the inspector to obtain entry and desired records and this Court should grant certiorari to resolve this important question.

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21. ". . . [W]e base today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other different administrative schemes." 436 U.S. at ....., 98 S.Ct. at 1825.

3. The Affidavits Used to Obtain the Search Warrants at Issue Failed to Supply the Requisite Probable Cause for the Issuance of the Warrants.

Petitioner incorporates by reference its argument on this point set forth in the petition for a writ of certiorari filed in this Court at No. 77-557.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. POLITO
ROGER CURRAN
900 Oliver Building
Pittsburgh, PA 15222

Counsel for Petitioner

Of Counsel:

WILLIAM J. MELVIN
50 West Broad Street
Columbus, OH 43215

Appendices

APPENDIX

FILED JULY 25, 1978
JOHN P. HEHMAN, Clerk

Nos. 76-2518, 76-2521 and 76-2522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-2518
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
CONSOLIDATION COAL COMPANY,
Defendant-Appellee.

NO. 76-2521
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
FRANCIS LEO MARKS,
Defendant-Appellee.

NO. 76-2522
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
RAYMOND ZITKO,
Defendant-Appellee.

Order

Before: CELEBREZZE and ENGEL, *Circuit Judges,* and CECIL, *Senior Circuit Judge.*

In *United States v. Consolidation Coal Co.*, 560 F.2d 214 (6th Cir. 1977), *vacated* and *remanded* ..... U. S. ..... (1978), this court reversed the district court's suppression of evidence seized from the offices of a coal mine operator. We reasoned that the district court erred in applying conventional criminal probable cause tests in examining the sufficiency of the search warrants involved. We upheld the warrants based upon "a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment." 560 F.2d at 218.

Three defendants petitioned the Supreme Court for writs of certiorari. In response thereto, the Supreme Court vacated our judgment and remanded the causes to this Court "for further consideration in light of *Marshall v. Barlow's, Inc.*, 436 U.S. ..... (1978) and *Michigan v. Tyler*, 436 U.S. ..... (1978)."

Inasmuch as the searches in question were conducted pursuant to search warrants and we have determined that the warrants met the same administrative search probable cause standard articulated in *Marshall*[1] and *Tyler*,[2] we see no reason to alter our original holding. Moreover, our holding that administrative search warrants were required under the facts of this case under the Federal Coal Mine Health and Safety Act of 1969 is fully consistent with the holding in *Marshall* that administrative search warrants are required under the Occupational Safety and Health Act of 1970.

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1. Continued
2. Continued

Therefore, it is hereby ordered that the prior judgment of this court be reinstated for the reasons set forth in our original opinion, 560 F.2d 214, and the judgment of the district court is reversed and the causes are remanded for further proceedings consistent with that opinion.

Judge Engel concurs, but for the more limited reasons expressed in his original concurrence. *See* 560 F.2d at 222.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk

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1. Continued
Marshall v. Barlow's, Inc., 436 U.S. ....., ... (1978), Slip Opinion at 12-13.

2. Continued
Michigan v. Tyler, 436 U.S. ....., ... n.5 & ..... (1978), Slip Opinion at 6 n. 5 & 8.

APPENDIX

FILED AUGUST 29, 1978
JOHN P. HEHMAN, Clerk

Nos. 76-2518, 76-2521 and 76-2522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CONSOLIDATION COAL COMPANY, a corporation; FRANCIS LEO MARKS, RAYMOND ZITKO,
Individuals,
Defendants-Appellees.

Order

Before: CELEBREZZE and ENGEL, *Circuit Judges,* and CECIL, *Senior Circuit Judge.*

Appellee, Consolidation Coal Company, filed a petition for rehearing with a request for rehearing en banc. No judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN,
Clerk

APPENDIX

FILED SEPTEMBER 14, 1978
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-2518

United States of America,
Plaintiff-Appellant

v.

Consolidation Coal Company, et al.
Defendant-Appellee

Order Staying Mandate

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN,
Clerk

APPENDIX

Section 103 (30 U.S.C. §813) of the Federal Coal Mine Health and Safety Act of 1969.

INSPECTIONS AND INVESTIGATIONS—PURPOSES

(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

Right of entry of investigators

(b) (1) For the purpose of making any inspection or investigation under this chapter, the Secretary or any authorized representative of the Secretary shall have a right of entry to, upon, or through any coal mine.

(2) For the purpose of developing improved mandatory health standards, the Secretary of Health, Education, and Welfare or his authorized representative shall have a right of entry to, upon, or through, any coal mine.

(3) The provisions of this chapter relating to investigations and records shall be available to the Secretary of Health, Education, and Welfare to enable him to carry out his functions and responsibilities under this chapter.

Utilization of facilities and personnel of other Federal agencies

(c) For the purpose of carrying out his responsibilities under this chapter, including the enforcement thereof, the Secretary may by agreement utilize with or without reimbursement the services, personnel, and facilities of any Federal agency.

Hearings; subpena; fees; contempt

(d) For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear

and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Notice of accident; preservation of evidence; supervision of rescue operations

(e) In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

Orders to insure protection of persons and property

(f) In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

Imminent danger notice; requisites; special inspection

(g) Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter.

Accompaniment right of representative of miners

(h) At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Hazardous conditions; spot inspections

(i) Whenever the Secretary finds that a mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine other especially hazardous conditions, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. Pub.L. 91—173, Title I, § 103, Dec. 30, 1969, 83 Stat. 749.

Section 108 (30 U.S.C. §818) of the Federal Coal Mine Health and Safety Act of 1969.

CIVIL ACTION FOR RELIEF; JURISDICTION AND VENUE; GROUNDS FOR INVOCATION OF REMEDIES; FORCE AND EFFECT OF ORDERS; REPRESENTATION OF SECRETARY

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (a) violates or fails or refuses to comply with any order or decision issued under this chapter, or (b) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter, or (c) refuses to admit such representatives to the mine, or (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine, or (e) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or (f) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter. Each court shall have jurisdiction to provide such relief as may be appropriate. Temporary restraining orders shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice,

shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce an order under clause (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless, prior thereto, the district court granting such relief sets it aside or modifies it. In actions under this section, subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him. In any action instituted under this section to enforce an order or decision issued by the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Pub.L. 91—173, Title I, § 108, Dec. 30, 1969, 83 Stat. 756.

Section 109 (30 U.S.C. §819) of the Federal Coal Mine Health and Safety Act of 1969.

PENALTIES—CIVIL PENALTIES FOR VIOLATIONS OF MANDATORY HEALTH AND SAFETY STANDARDS; HEARINGS; FACTORS DETERMINING ASSESSMENT; FINDINGS; APPLICABILITY OF SECTION 554 OF TITLE 5; PROCEDURES FOR ENFORCEMENT

(a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, except the provisions of subchapter IV of this chapter, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health and safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any minor who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been liti-

gated in review proceedings before a court of appeals under section 816 of this title, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

Willful violations or refusal to comply with health and safety standards by operators of mines

(b) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 820(b) (2) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or by both.

Willful violations or refusal to comply with health and safety standards by corporate operators of mines

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under

this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 820(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

False statements or representations

(d) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter or any order or decision issued under this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Distribution or sale of noncomplying components

(e) Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (d) of this section.

Pub.L. 91—173, Title I, § 109, Dec. 30, 1969, 83 Stat. 756.

Supreme Court, U. S.
FILED
NOV 22 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-532, 78-537 and 78-697

In the Supreme Court of the United States

OCTOBER TERM, 1978

CONSOLIDATION COAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND J. ZITKO, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS LEO MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
WILLIAM C. BROWN
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-532

CONSOLIDATION COAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-537

RAYMOND J. ZITKO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-697

FRANCIS LEO MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 28a-44a)[1] is reported at 560 F.2d 214. The opinions of the district court (Pet. App. 1a-20a, 21a-24a, 25a-27a) and the opinion of the court of appeals on remand from this Court (Pet. App. 47a-49a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1978. A petition for rehearing was denied on August 29, 1978 (Pet. App. 50a). The petition for a writ of certiorari was filed on September 27, 1978, in No. 78-532, on September 28, 1978, in No. 78-537, and on October 25, 1978, in No. 78-697. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrants authorizing the search of various business premises owned by petitioner Consolidation Coal Company were based upon sufficient cause to satisfy the Fourth Amendment.

2. Whether petitioners Zitko and Marks have standing to challenge the search of company offices other than their own.

STATEMENT

1. On May 21, 1974, a United States Magistrate issued several warrants authorizing federal officers

[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 78-537.

to search the general office and five field offices of the Consolidation Coal Company (Consolidation) in Georgetown, Ohio, for evidence of violations of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*[2] Based on lengthy affidavits of two officials of the Department of the Interior, William Holgate and Thomas Jeskey, the magistrate found probable cause to believe that the premises sought to be searched contained "exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples" (Pet. App. 51a-52a) that had been used for the purpose of circumventing federal laws for monitoring atmospheric conditions in mines that cause "black lung" disease. See 30 U.S.C. 819(b), (c) and (d); 30 U.S.C. 842; 30 C.F.R. Part 70 (1977).

The next day, searches were conducted pursuant to the warrants at the designated offices, and a number of incriminating cassettes and records were seized (Pet. App. 52a-56a, 67a-69a, 75a, 79a-83a, 87a-88a, 92a-94a). In August 1975, a multi-count indictment was returned by a grand jury of the United States District Court for the Southern District of Ohio charging petitioners with conspiracy, in violation of 18 U.S.C. 371, knowingly submitting false statements to the Department of the Interior, in violation of 30 U.S.C. 819(d), and willfully violating mandatory coal

[2] Warrants were also issued to search three additional mining offices operated by Consolidation, but no evidence was seized at one site and material seized at the other two sites was voluntarily returned to the company by the government.

mine health and safety standards, in violation of 30 U.S.C. 819(b) and (c).

On June 11, 1976, without first holding an evidentiary hearing, the district court granted petitioner Consolidation Coal Company's motion to suppress all evidence seized in the six searches on the ground that the warrants were not supported by probable cause (Pet. App. 1a-20a). In a separate order dated October 4, 1976, the district court held that petitioners Zitko and Marks, as corporate employees with supervisory responsibilities over the personnel and records at the offices searched, had standing to contest the six searches, and therefore it also suppressed the evidence as to them (Pet. App. 21a-24a). The government appealed, and the court of appeals reversed the suppression orders (Pet. App. 28a-44a). On June 5, 1978, this Court granted certiorari (Pet. Nos. 77-557, 77-606 and 77-622), vacated the court of appeals' judgment and remanded the case for further consideration in light of *Marshall* v. *Barlow's, Inc.*, No. 76-1143 (May 23, 1978), and *Michigan* v. *Tyler*, No. 76-1608 (May 31, 1978) (Pet. App. 46a). On remand, the Sixth Circuit adhered to its original conclusion that the district court had erred in granting petitioners' motions to suppress (Pet. App. 47a-49a).

2. The search warrant affidavits submitted by inspectors Holgate and Jeskey (Pet. App. 57a-65a) stated that on May 15, 1974, they met with an unnamed former company employee who had worked at Consolidation's Franklin No. 25 and Franklin Highwall mines. According to the former employee, who

spoke from personal knowledge, he had been instructed by his supervisors to maintain a supply of extra cassettes that contained respirable dust samples collected under controlled conditions. The former employee was directed to send all dust cassettes collected under actual mining conditions to technicians at Consolidation's laboratory, where the cassette could be opened and its contents analyzed. If a legitimate sample was found to offend the mandatory federal health standard, an artificially "clean" (low) sample, prepared by company technicians under controlled conditions, would be substituted and the authenticating documentation altered to conform (*id.* at 58a-60a). The former employee said that he had been told by certain laboratory technicians, whom he identified by name, that similar practices were followed at other Consolidation mines located within the central region of Ohio (*id.* at 60a).

Moreover, the former employee informed the federal inspectors that a list of all cassette samples actually collected as well as those subsequently voided was kept on a bulletin board at the environmental office at the Franklin No. 25 mine, and he gave Inspector Jeskey a xerox copy of a list taken from the mine office showing that certain cassettes for collecting "high risk dust samples" (*id.* at 59a, 63a-64a) had been voided. The former employee also said that a brown master book containing a listing of all voided and fictitious samples was kept in a desk drawer at the mine office, along with a number of cassettes containing fictitious samples (*id.* at 59a-60a).

Finally, Inspector Jeskey's affidavit related that on May 16, 1974, the day after speaking with the former employee, he went to the Franklin No. 25 mine's environmental office, which was made available for use by federal mining inspectors. While there, Inspector Jeskey observed on the bulletin board a six-page list of respirable dust samples, including a record of at least six voided cassettes, which was similar to the xerox copy that he had previously received from the former employee. A short time later, Inspector Jeskey saw a company technician take a hard bound book from the desk drawer in the environmental office and place it in a pocket of the coveralls he was wearing, but the inspector was unable to ascertain what the book contained (Pet. App. 64a).

ARGUMENT

1. Petitioners contend (78-532 Pet. 19; 77-537 Pet. 20-21; 78-697 Pet. 19) that the search warrants were not supported by probable cause because there was no showing that the former employee of Consolidation was credible or that his information was reliable, as required by this Court's decisions in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969).[8]

[8] The court of appeals did not resolve the probable cause issue, stating that although it "tend[ed] to agree" with the government that the affidavits were sufficient to provide probable cause under the *Aguilar-Spinelli* analysis if read in a commonsense fashion, there were "more compelling [reasons] for reversal than [the district court's] mere misreading of the affidavits" (Pet. App. 34a). Judge Engel, who concurred in the judgment, was "fully satisfied that the government's affidavits meet the more stringent standards of *Aguilar* and *Spinelli* and [are] sufficient to uphold the search and seizure" (*id.* at 44a).

We note at the outset that the *Aguilar-Spinelli* requirements were addressed to the particular problem of warrants issued on the basis of information provided by professional informants, and several courts have suggested that they should not be applied in "wooden fashion" (*United States* v. *Burke*, 517 F.2d 377, 380 (2d Cir. 1975) (Friendly, J.)) to other contexts where relevant information of criminal activity has been provided out of a sense of civic duty by an eyewitness to or a victim of the crime. See, *e.g.*, *United States* v. *Campbell*, 575 F.2d 505, 507 (5th Cir. 1978); *United States* v. *Swihart*, 554 F.2d 264, 268-269 (6th Cir. 1977); *United States* v. *Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); *United States* v. *Darensbourg*, 520 F.2d 985, 988-989 (5th Cir. 1975); *Rutherford* v. *Cupp*, 508 F.2d 122, 123 (9th Cir. 1974), cert. denied, 421 U.S. 933 (1975); *Cundiff* v. *United States*, 501 F.2d 188, 190 (8th Cir. 1974). Here, the information was given to the agents by a person who had been privy to the commission of illegal activities in his capacity as a corporate employee. Petitioners do not suggest that he was a paid informant, that he had a motive to falsify, or that he was involved in any way in the ongoing criminal enterprise. In such circumstances, all that the Fourth Amendment requires is that the magistrate have a "substantial

basis" for crediting the informant. *United States* v. *Harris*, 403 U.S. 573, 581 (1971).

In any event, when the affidavits are read in a commonsense manner (*United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)) and "the usual inferences which reasonable men draw from evidence" are made (*Johnson* v. *United States*, 333 U.S. 10, 14 (1948)), it is readily apparent that the *Aguilar-Spinelli* test was satisfied in this case.[4] As detailed above, the government's probable cause showing was based both upon the information supplied by a former company employee and upon the corroborative observations of a federal investigator.[5] The affidavits plainly afforded

[4] Of course, reviewing courts must pay deference to a magistrate's determination of probable cause when, as here, there is a substantial basis for that finding. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 423 (1976); *Spinelli* v. *United States*, *supra*, 393 U.S. at 419; *Jones v. United States*, 362 U.S. 257, 270-271 (1960).

[5] Although the Jeskey affidavit was submitted specifically to support only the warrant for the search of the Franklin No. 25 mine, the magistrate properly considered it, along with the Holgate affidavit, in determining whether there was probable cause to search the Georgetown district office and the other field offices and in determining whether the informant and his information were reliable. The affidavits were submitted to the magistrate at the same time and related closely to the same investigation. In such circumstances, "[i]t would be hypertechnical for the [magistrate] not to act upon an entire picture disclosed to him in interrelated affidavits presented to him on the same day." *United States* v. *Serao*, 367 F.2d 347, 350 (2d Cir. 1966), vacated on other grounds, 390 U.S. 202 (1968). See also *United States* v. *Dudek*, 560 F.2d 1288, 1292-1293 (6th Cir. 1977), cert. denied, 434 U.S. 1037 (1978); *United States* v. *Manufacturer's National Bank*, 536 F.2d 699, 702 (6th Cir. 1976), cert. denied, 429 U.S. 1039 (1977).

a sufficient basis to conclude that the former employee's information was reliable, since they stated that he had gained much of his information by first-hand observation, while other facts that he passed along to the agents could only have been obtained by personal knowledge. See *United States* v. *Jenkins*, 525 F.2d 819, 823 (6th Cir. 1975); *United States* v. *Jensen*, 432 F.2d 861, 863 (6th Cir. 1970). Thus, according to the affidavits, the employee was previously employed at the Franklin No. 25 mine, he had participated in the dust sampling program at the mine, and he had been told by his superiors to maintain a supply of extra dust cassettes collected under controlled conditions and to forward all cassette samples to Consolidation's Georgetown laboratory (Pet. App. 59a). The employee also had been informed by two named technicians at the laboratory that it was a company practice to submit fictitious dust samples to federal inspectors in other of the company's mines in the central Ohio district (*id.* at 59a-60a).[6]

Moreover, the reliability of the former employee's information was supported by its very detail. The employee described the records and their locations in the Franklin No. 25 mine office with specificity and also furnished a xerox copy of some of the records, including a list describing certain respirable cassette dust samples as "void." This information was substantially corroborated the next day when Inspector

[6] These statements may have been against the technicians' penal interests. See *United States* v. *Harris*, *supra*, 403 U.S. at 580, 583-584.

Jeskey went to the mine office and observed many of the records that the informant had previously described. *Draper* v. *United States*, 358 U.S. 307, 313 (1959). Copies of some of the documents were attached as an exhibit to the affidavit. See *Andresen* v. *Maryland*, 427 U.S. 463, 478 n.9 (1976). In sum, the affidavits here "contain[ed] a sufficient statement of the underlying circumstances" to establish probable cause to believe that Consolidation was violating the respirable dust standards of the Federal Coal Mine Health and Safety Act and that the information was based "on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on * * * general reputation." *Spinelli* v. *United States*, *supra*, 393 U.S. at 416.[7]

2. Although it is unnecessary to reach the question in view of the magistrate's issuance of search warrants upon probable cause, we believe that the searches here could properly have been undertaken without a warrant as a statutorily-authorized inspection of a "pervasively regulated business." *United States* v. *Biswell*, 406 U.S. 314, 316 (1972). See also *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970).

[7] Indeed, in light of the legal requirement that a mine operator must "promptly collect and transmit" *all* dust samples to the Department of the Interior (see 30 C.F.R. 70.260(a) (1977); 30 U.S.C. 814(i)), the information pertaining to the preparation of extra cassettes and the voiding of sample dust cassettes apparent from the records alone was sufficient to give the agents probable cause to believe that the monitoring provisions of the Act were being violated.

Colonnade Catering involved the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Federal inspectors, without a warrant or the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. After reviewing the history of federal involvement in the regulation of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and had "broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand" (397 U.S. at 76). Although the Court invalidated the search in that case, it was because Congress had not specifically authorized warrantless entries in the applicable regulatory statute and had instead provided an alternative remedy, not because the Fourth Amendment would have barred such inspections if legislatively authorized. *Id.* at 77.

Similarly, in *Biswell*, the Court was faced with the warrantless search of a locked commercial storeroom during business hours as part of a federal gun control program authorized by 18 U.S.C. 923(g), which resulted in the seizure of unlicensed firearms from a federally licensed gun dealer. While federal regulation of firearms was not as deeply rooted in history as was governmental control of liquor, the Court sustained the warrantless inspection program challenged in that case because of the program's importance in the prevention of violent crime, the fact that a warrant requirement would have impeded enforcement in light of the ease with which statutory violations could

be concealed, and the limited nature of the inspection's interference with the gun dealer's right to privacy. 406 U.S. at 315-316.[8]

Here, as in *Biswell*, "[l]arge interests are at stake" (406 U.S. at 315). In the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*, Congress has responded to the dangers involved in coal mining—"the most hazardous occupation in the United States" (H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 1 (1969)) and an "industry [with] a history of close federal regulation" (Pet. App. 40a)[9]—by requiring "frequent inspections and investigations in coal mines each year for * * * enforcement purposes" (H.R. Rep. No. 91-563, *supra*, at 7). To com-

[8] As the Court observed (406 U.S. at 316):

> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

[9] See *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 49-50, 52 (S.D. Ohio 1973) (three-judge court). The 1969 Act has recently been amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 *et seq.*, which became effective on March 9, 1978. This statute substantially strengthens the enforcement powers of the Secretary of the Interior and the Secretary of Health, Education, and Welfare in many respects; in other respects it merely redesignates existing provisions without changing their substance. For convenience we will refer throughout to the provisions of the 1969 Act, which were in effect at the time of the searches in this case.

bat the frequent occurrence of lung disease associated with unhealthful mining practices, Congress enacted strict measures for monitoring the air in coal mines (30 U.S.C. 842) and explicitly gave federal authorities the right to enter any "coal mine" to conduct inspections and investigations to ensure compliance with the federal regulations (30 U.S.C. 813(a) and (b)).[10] To guarantee that the Act's broad remedial purposes would be effectuated, Congress expansively defined a "coal mine" to include all surface structures and facilities used in or resulting from the work of extracting coal (30 U.S.C. 802(h)).[11]

Thus, as in *Biswell*, Congress has adopted "a regulatory inspection system of business premises that is carefully limited in time, place, and scope" (406 U.S.

[10] Contrary to petitioners' claim, there is no conflict between this case and *Midwest Growers Co-op Corp.* v. *Kirkemo*, 533 F.2d 455 (9th Cir. 1976). The regulatory statute in *Midwest Growers* was found not to allow warrantless inspections, or searches pursuant to administrative warrants, because it did not provide the administrative agency with the power of entry to make its inspections. The Federal Coal Mine Health and Safety Act, by contrast, expressly grants officers a "right of entry to, upon, or through" the regulated premises as well as the power to conduct "inspection[s]" and "investigation[s]" (30 U.S.C. 813(a) and (b)(1)). Furthermore, the decision in *Marshall* v. *Barlow's, Inc.*, *supra*, demonstrates that the courts may construe regulatory statutes to provide for an administrative warrant procedure in cases where Congress has clearly authorized the government to enter business premises for the purpose of making inspections.

[11] Where Congress wished to limit the scope of inspection to the "active workings" of mines, it did so in express terms. See 30 U.S.C. 842(g).

at 315). The searches here were conducted by federal mine inspectors pursuant to this important regulatory scheme during regular business hours at surface structures intimately tied to the work of extracting coal and where records relating to the federal respirable coal dust sampling program could be found. The court of appeals properly recognized that mine operators have "virtually no expectation of privacy in records and paraphernalia which they exclusively maintain in compliance with the Act" (Pet. App. 40a-41a) and that the mine inspector's right of direct access to these records was fundamental to the statutory scheme (Pet. App. 36a):

> It follows that business records and other paraphernalia, which are maintained pursuant to the Act, are appropriate targets for periodic federal scrutiny. *Youghiogheny and Ohio Coal Company* v. *Morton*, supra at 51 n. 5. In the instant case, these materials constitute the veritable life blood of a statutory scheme which contemplates responsible, self-monitoring of working conditions by mine operators. The efficacy of the respirable dust control program, 30 U.S.C. § 842, is entirely dependent upon the integrity with which operators sample, record and report these conditions. We see no other realistic way to ensure compliance short of direct, on-site access to these records as they are *internally* maintained.

It follows that since "[t]he reasonableness of a warrantless search * * * depend[s] upon the specific enforcement needs and privacy guarantees of each [regulatory] statute" (*Marshall* v. *Barlow's Inc.*,

supra, slip op. 13), the searches here—even though authorized by warrants issued on probable cause—were independently sanctioned by a valid inspection statute and could have been carried out even without the warrant.[12]

3. Petitioners argue (78-532 Pet. 8-12; 78-537 Pet. 16-17; 78-697 Pet. 18) that the court of appeals erred in holding that, in light of the "regulatory character" of the searches in this case, issuance of the search warrants could be sustained "upon a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967)" (Pet. App. 35a). As we have demonstrated above, however, the warrants here were supported by the traditional standard of probable cause applicable to non-administrative searches, and, in any event, the searches were permissible under the *Colonnade-Biswell* exception to the warrant requirement. Thus, regardless of the correctness of the court of appeals'

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[12] *Marshall* v. *Barlow's, Inc.*, *supra*, is not inconsistent with this position. Although the Court held in *Barlow's* that the warrantless searches authorized by the Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. 651 *et seq.*, did not fit within the *Colonnade-Biswell* exception to the warrant requirement, it expressly noted that its decision was based "on the facts and law concerned with OSHA" (slip op. 14) and that a different result might occur where the regulatory statute involved applied only to a single closely regulated industry, as does the Mine Safety Act (*id.* at 13-14).

conclusion,[13] it is unnecessary for this Court to reach the question whether the searches could also be upheld as pursuant to administrative search warrants issued under the authority of the Mine Safety Act.[14]

[13] We are aware of no other appellate decision that has considered the availability of administrative warrants under the Mine Safety Act. While petitioners, relying on *Michigan* v. *Tyler*, *supra*, argue that such warrants may not issue in any case where the search is "predicated upon overt criminal suspicion" and is "for the purpose of obtaining evidence of criminal activity" (78-537 Pet. 17), it is anomalous to maintain that the authority to search is broader when there is less reason to suspect a criminal violation. Cf. *Scott* v. *United States*, 436 U.S. 128, 136-138 (1978). Indeed, Section 109(b) of the Act (30 U.S.C. 819(b)) makes it a criminal offense for a coal mine operator willfully to violate a mandatory health standard. Thus, there is always the possibility that an inspection under 30 U.S.C. 813 will uncover a criminal violation. Whether or not an inspector has reason to suspect that a criminal violation has occurred, if the purpose of the search remains at least in part to determine if there has been compliance with the health and safety standards of the Act, then an administrative warrant should be adequate. See *United States* v. *Prendergast*, No. 78-1357 (3d Cir. Sept. 29, 1978), slip op. 3-4; *United States* v. *Goldfine*, 538 F.2d 815, 819 (9th Cir. 1976). Such initial inspections are similar to "entries to investigate the cause of the fire" in *Michigan* v. *Tyler*, *supra*, slip op. 12, for which the Court found that an administrative warrant would suffice, rather than to the "further access to gather evidence for a possible prosecution" (*ibid.*), for which a traditional showing of probable cause was required.

[14] Thus, we agree with the concurring opinion of Judge Engel in the court below, who concluded that, because the government agents' affidavit met "the more stringent standards of *Aguilar* and *Spinelli*," there is no occasion to consider the administrative search question in this case (Pet. App. 44a).

4. Relying on the arguments he presented in his earlier petition (Pet. No. 77-606), petitioner Marks asserts (78-697 Pet. 19-20) that he has standing to contest each of the six searches.[15] This issue was not decided by the court of appeals (Pet. App. 32a n.7) and need not be considered by this Court, since, as we have shown, the searches of Consolidation's property did not violate the Fourth Amendment. Petitioner's claim is, in any event, without merit.

Throughout the course of these proceedings, the government has acknowledged that petitioners Marks and Zitko have standing to object to the introduction of evidence seized from their personal offices at the company's district headquarters at Georgetown, Ohio. Relying on *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), petitioner Marks contends that he also has standing to challenge the legality of the searches at the five mine sites because, as an environmental officer for the company, he was ultimately responsible for its respirable dust records and periodically visited the five field offices. This contention is incorrect.

In *Brown* v. *United States*, 411 U.S. 223, 229 (1973), the Court repeated the general rule that a defendant is not a "person aggrieved by an unlawful search or seizure" (Fed. R. Crim. P. 41(e)) unless he is able to show that he was on the premises at the time of the contested search or seizure, had a proprietary or possessory interest in the premises searched,

[15] Although petitioner Zitko does not raise the standing issue in this Court, his position is identical to that of petitioner Marks, and our argument is equally applicable to both petitioners.

or was charged with an offense that included, as an essential element, possession of the seized evidence at the time of the alleged Fourth Amendment violation. This rule was applied in *DeForte* in the context of the search of a private office shared by DeForte and other union officials and the seizure of union records. In concluding that DeForte could properly challenge the search, the Court observed that "[i]t has long been settled that one has standing to object to a search of his office [and] * * * that the situation was not fundamentally changed because DeForte shared an office with other union officers" (392 U.S. at 369). The Court specifically noted that DeForte was present when the search occurred (*id.* at 365), that he had "spent 'a considerable amount of time' in the office and that he had custody of the papers at the moment of their seizure" (*id.* at 368-369; footnote omitted). In these circumstances, the Court concluded that he had "a reasonable expectation of freedom from governmental intrusion" (*id.* at 368) in the area searched. See *United States* v. *Stull*, 521 F.2d 687, 692 (6th Cir. 1975), cert. denied, 423 U.S. 1059 (1976).

Thus, the simple allegation of a "supervisory" responsibility over the general area searched does not give a corporate official standing to contest the seizure of corporate records, because *DeForte* requires "a demonstrated nexus between the area searched and the work space of the defendant." *United States* v. *Britt*, 508 F.2d 1052, 1056 (5th Cir.), cert. denied, 423 U.S. 825 (1975). See also *United States* v.

Cella, 568 F.2d 1266, 1282-1283 (9th Cir. 1977); *Lagow* v. *United States*, 159 F.2d 245, 246 (2d Cir. 1946), cert. denied, 331 U.S. 858 (1947). Here, there was no such nexus between petitioners Marks or Zitko and the five field offices. Neither petitioner was present at any of these sites when the searches occurred and neither of them maintained a personal office in those locations. They therefore have standing to seek suppression only of the evidence obtained at their own work areas in Consolidation's district office in Georgetown.[16]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
WILLIAM C. BROWN
Attorneys

NOVEMBER 1978

[16] Petitioner Marks (77-606 Pet. 19-20) also misperceives the automatic standing rule announced in *Jones* v. *United States*, 362 U.S. 257, 263 (1960). Petitioner was not charged with any offense that contains, as an essential element, possession of the seized evidence at the time of the contested search and seizure. Contrary to his apparent belief, he cannot claim standing merely because the seized evidence might be introduced against him at trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-532

CONSOLIDATION COAL COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

ANTHONY J. POLITO
ROGER CURRAN
900 Oliver Building
Pittsburgh, Pa. 15222
Counsel for Petitioner

Of Counsel:

WILLIAM J. MELVIN
50 West Broad Street
Columbus, Ohio 43215

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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Supreme Court of the United States

OCTOBER TERM, 1978

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CONSOLIDATION COAL COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITIONER'S REPLY MEMORANDUM

ARGUMENT

While making a brief comment on *Michigan v. Tyler*[1] in footnote 13 of the Brief in Opposition,[2] the Government has made no effort to refute petitioner's contention that the Sixth Circuit's decision is in direct conflict with the holding of this Court in *Tyler*. Instead, it argues that, "regardless of the correctness of the court of appeals' conclusion . . ." (pp. 15-16), certiorari should nonetheless be denied for the following [in our view unsupportable] reasons: (1) the search warrant affidavits in question satisfied the *Aguilar-Spinelli*[3] test; and (2) alternatively, a warrantless search was permissible under the holdings in the *Biswell*[4] and *Colonnade*[5] cases.

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1. 436 U.S. ___, 98 S.Ct. 1942 (1978).

2. Brief in Opposition at 16.

3. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

4. *United States v. Biswell*, 406 U.S. 311 (1972).

5. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

Argument.

1. *The Sixth Circuit's Decision is in Direct Conflict with Michigan v. Tyler:* It is respectfully submitted that the Government's footnoted comments on *Tyler* avoid the fundamental conflict between that case and the Sixth Circuit's conflicting decision here. Recognizing this to be a case of first impression under the Mine Safety Act, the Government suggests [in footnote 13] that "initial inspections" by "an inspector", so long as "the purpose of the search remains at least in part to determine if there has been compliance" with the Act, "are similar to 'entries to investigate the cause of the fire' . . . for which the Court found [in *Tyler*] that an administrative warrant would suffice . . . ." Regardless of its accuracy, such a contention is of purely academic interest [and was no doubt relegated to a footnote for that very reason] because both the Government and the Sixth Circuit have repeatedly acknowledged that, from the outset, the searches and seizures involved here were for the *specific and sole purpose of obtaining evidence for a criminal prosecution.*[6]

The acknowledgment of criminal purpose in this case is compelled by the direct involvement of lawyers from the Criminal Division of the Justice Department in the obtainment of the search warrants, the special deputization of United States Marshals to execute the warrants and the fact that the warrants and supporting affidavits themselves state that the Government was seeking evidence of violations of the criminal [as distinguished from the civil] penalty provisions of the Act. (*See, e.g.*, A. [77-557] 52a-55a, 63a-64a.)

6. *United States v. Consolidation Coal Company*, 560 F.2d 214, 216, 216 n.6, 218, 220 (6th Cir. 1977); Gov't. Brief in Opposition at 3-4; Gov't. Brief in Opposition [filed at No. 77-557] at 10 n.8.

Argument.

United States v. Prendergast[7] and *United States v. Goldfine*,[8] referred to by the Government in footnote 13, involve entirely different circumstances. In both cases, the administrative warrants were issued pursuant to the same federal statute[9] specifically authorizing the issuance of such warrants. No statutory authorization for administrative warrants is provided in the Mine Safety Act. Above all, as the *Prendergast* court noted, "there was no commitment [in that case] to criminal prosecution . . . prior to the issuance of an administrative warrant as distinguished from imposition of civil penalties for violation of record keeping requirements."[10] As discussed, in this case the Government was from the beginning committed to a criminal prosecution and the purpose of the searches was to obtain evidence for that prosecution.

In summary, this case presents the situation where the investigating officials believed that a criminal violation had occurred and required "access to gather evidence for a possible prosecution" necessitating the obtainment of a warrant "upon a traditional showing of probable cause applicable to searches for evidence of crime." *Michigan v. Tyler*, 436 U.S. at —, 98 S.Ct. at 1951. Thus, a direct and irreconcilable conflict exists between the Sixth Circuit's decision and this Court's holding in *Tyler* which the Government has not seriously disputed and certiorari should be granted to correct the erroneous court of appeals decision. Although petitioner strongly disagrees with the Government's contention that other

7. 585 F.2d 69 (3d Cir. 1978).
8. 538 F.2d 815 (9th Cir. 1976).
9. 21 U.S.C. § 880.
10. 585 F.2d at 71 n.1.

grounds exist for a denial of certiorari, such a resolution would nonetheless leave standing a conflicting and erroneous holding in the Sixth Circuit.

2. *The Aguilar-Spinelli Test:* In support of its argument that the *Aguilar-Spinelli* test was satisfied, the Government has represented to this Court that the unnamed informant "had been privy to the commission of illegal activities . . ." (p. 7) and that his information was based upon "first-hand observation" and "personal knowledge" (p. 9). Petitioner disagrees with this representation and further submits that it is precisely the lack of specificity as to how the unnamed informant obtained his information concerning the activities of employees at the Georgetown laboratory, located several miles away from his own office at the Franklin 25 mine, which the district court found[11] to be fatal in testing the sufficiency of the affidavits.

It is obvious that the informant did not personally witness any illegal activities and that he had no "personal knowledge" of claimed criminal conduct at the Georgetown laboratory. It was not even shown when the former employee-informant was employed by petitioner so as to be able to determine whether or not his information was stale. By contrast, his own activities at the Franklin 25 mine, as well as the claimed corroborative information obtained by the federal inspector, were, as the district court properly determined, completely "neutral."[12]

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11. A. [77-557] 41a.
12. A. [77-557]40a.

Furthermore, the failure to indicate in the affidavits how the *unnamed* informant came by his information as to the alleged illegal activities also serves to distinguish this case from the circuit court cases cited by the Government on page 7 of its Brief in Opposition. Each of those cases involved a *named* informant whose information was obtained through personal observation or knowledge because he was either an eyewitness to or a victim of a crime. Such is clearly not the case here.

Nor is the present case analogous to *United States v. Harris,*[13] cited by the Government on pages 7-8. *Harris* involved "personal and recent observations" of criminal activity by the informant, who had also made a declaration against his penal interest. *Harris* did not involve a situation, such as was present in *Spinelli* and in this case, where "the affidavit failed to explain how the informant came by his information."[14]

3. *Warrantless Search:* In another effort to justify the denial of certiorari, the Government alternatively argues that "the searches here could properly have been undertaken without a warrant as a statutorily authorized inspection of a 'pervasively regulated business'" (p. 10). Despite the Government's apparent suggestion to the contrary at p. 14 of its Brief in Opposition, the Sixth Circuit rejected "out of hand" this warrantless search contention, concluding that "only inspections of the *underground* portions or 'active workings' of coal mines [as distinguished from mine offices] may be performed without search warrants under Section 813(a)

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13. 403 U.S. 573 (1971).
14. *Id.* at 579.

and (b)."[15] Additionally, the Sixth Circuit pointed out that "nothing in the Act authorizes the wholesale seizure of records which took place here."[16]

In the Mine Safety Act, as in the legislation controlling liquor dealers in *Colonnade* and in the Gun Control Act in *Biswell,* Congress selected a standard that did not expressly provide for forcible entry and seizure. Instead, the Government was given a civil remedy of obtaining an injunction whenever an operator refuses to permit inspection of the mine or to furnish requested documents and records.[17] Additionally, civil penalties may be imposed upon those operators refusing entry or access to records.[18] Compare *Colonnade* and *Biswell* where criminal penalties could be imposed for refusal of entry, but as here, forcible entry was not provided for.

Like the liquor dealer in *Colonnade* and the gun seller in *Biswell,* the mine operator may permit the entry and inspection or be subject to coercion and punishment by injunction and civil fines for refusal. The inspectors may not, however, force entry.[19] The Government (p. 11) fails to recognize that the *Colonnade* decision turned upon Congress' failure to provide federal inspectors with a right of *forcible* entry without a warrant

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15. 560 F.2d at 217 (emphasis original).

16. *Id.*

17. 30 U.S.C. § 818.

18. 30 U.S.C. § 819(a).

19. The *Biswell* defendant, unlike the defendant in *Colonnade,* expressly consented to the entry rather than face criminal prosecution for refusal. By contrast, the forcible entry in *Colonnade,* made despite the defendant's refusal to consent, was struck down.

rather than, as the Government claims, that Congress had not provided for warrantless entries at all.

Here, the searches were accompanied by unauthorized force, to wit, the use of invalid warrants. No consent to these forcible entries was given since submission to an invalid warrant does not constitute consent. *Bumper v. North Carolina,* 391 U.S. 543 (1968).

In any event, as argued at length in the petition for certiorari, a search for criminal evidence is clearly not the equivalent of an administrative inspection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. POLITO
ROGER CURRAN
900 Oliver Building
Pittsburgh, Pennsylvania 15222

Counsel for Petitioner